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ABSTRACT

An in-depth, exploratory analysis was conducted covering nine cases in which mediation was used as an alternative to the adversary system in arriving at divorce settlements. The analyses were based on audio recordings of mediation sessions and an intensive interview with each of the parties 3 to 12 months after the divorce. Four obstacles to effective mediation identified in an earlier study of labor mediators were also found to be problematic in divorce mediation: (1) high levels of internal conflict in one or both parties; (2) scarcity of divisible resources; (3) inexperience of the parties with the requirements of negotiation and mediation; and (4) a wide discrepancy in relative power. (Author)

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Mediated Negotiations in Divorce and Labor Disputes*

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This paper was presented at the 1977 National Council on Family Relations Conference in San Diego, California.

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Mediated Negotiations in Divorce and Labor Disputes: A Comparison

In 1975 there were more than one million divorces in the United States, double the number which occurred a scant 10 years earlier. It has been estimated that if the divorce rate continues to rise new marriages may be more likely to end in divorce than not (Weiss, 1975). It is also well-known that working out the terms of a divorce settlement--especially when children and the division of marital assets are involved--can be a complicated and highly conflictual task.

The traditional method for arriving at such settlements is the use of lawyers by each party in an adversarial process. Among the advantages of the adversarial model is the psychological belief of each party that their interests are being protected. The recent research of Thibaut and Walker (1975) suggests that by promoting a thorough exploration of alternative solutions, the adversarial model also increases the likelihood that the most objective decisions will be reached. From both within and without the legal profession, however, there has been mounting dissatisfaction with the adversarial model for arriving at divorce settlements. The focus on fault finding, and the availability of legal threats and counter-threats may seriously escalate the conflict, and the needs of the unrepresented children may be neglected.

Mediation by a neutral third party is an alternative to the adversarial model. Although the formal use of mediators to assist in the resolution of disputes has a long and venerable history in such institutionalized

settings as labor-management, international, and community conflicts, formalized mediation on an interpersonal level such as divorce is a less common occurrence. Mediation has also been a relatively neglected topic in social-psychological research on conflict resolution (Rubin & Brown, 1975).

The present paper is a preliminary report of an in-depth, exploratory investigation of an innovative approach to the mediation of divorce settlements. At this stage of the analysis results are incomplete but certain general conclusions are clear enough to warrant reporting. We will focus here on parameters of the bargaining situation which complicate the divorce mediator's task and on possible alternative strategies for handling these difficulties. An earlier study of labor mediators will serve as a comparative background against which to view strategic issues in mediation (Kressel, 1972).

Method

The investigation took the form of an in-depth analysis of nine mediated divorces, each of which used the innovative procedure developed by O. J. Coogler, a lawyer and psychotherapist, and founder of the Family Mediation Center in Atlanta, Georgia. The Center is a non-profit organization which has been providing Atlanta area couples with an impartial, third-party method for negotiating separation and divorce agreements for the last $2\frac{1}{2}$ years. Approximately 100 couples have used its services.

Couples are referred to the Center by lawyers, clergy, and psychotherapists. Nearly all of the couples who have used the mediation procedure

are white, middle to upper middle class, and have minor children.

Detailed written guidelines covering the groundrules for mediation and stipulating the obligations of the couple, the mediator, and the Mediation Center are provided in an initial orientation. Briefly, the rules provide for the direct negotiation by the couple of the terms of settlement in conjoint sessions presided over by a mediator (or mediators). An advisory attorney serves as a neutral, legal consultant for both spouses. Settlements are generally reached within 3 to 8 sessions averaging an hour to two hours each.

The present report is based on two primary sources of data: (a) The audio tapes of each couple's mediation sessions. These were recorded by the Center for research and training purposes with the knowledge and permission of the couples. (b) Extended, separate interviews with each of the spouses conducted by us 3 to 12 months after mediation had been completed and the divorce obtained. The interviews were tape-recorded and lasted from $2\frac{1}{2}$ to 4 hours each. They focused on the decision to mediate, the mediation experience, and the post-divorce adjustment.

The nine cases were intentionally selected to represent mediations of some complexity, and at least two cases from each of the Center's three principal mediators were included. (An interview study with a comparable group of divorced Atlanta couples who followed the traditional legal/adversarial process is currently nearing completion and will provide some data on the relative merits of the two approaches).

The highly structured format of the divorce mediation procedure and

the availability of extensive audio tapes of mediation sessions provided an ideal situation for a qualitative analysis of the mediation process. We would like to express our gratitude to the Mediation Center personnel, and to O. J. Coogler in particular, for permitting us access to these materials and for their tolerance in allowing us to scrutinize their pioneering efforts so closely.

Results and Discussion

Obstacles to Effective Mediation

In the labor mediators study four major factors were identified as inhibiting the parties' ability to negotiate constructively: High levels of internal conflict in one or both parties; scarcity of divisible resources; inexperience of the parties with negotiations and with mediated negotiations in particular; and a wide discrepancy in the parties' relative power. Our analysis indicates that these same parameters complicate the task of the divorce mediator, albeit the specific form which they take may be quite different from their form in labor-management disputes.

1. High levels of internal conflict. According to the labor mediators, internal divisiveness within one or both parties (in the form, for example, of a union leadership facing a strong dissident group within its own ranks) complicates the task of arranging compromises. Intransigence at the bargaining table becomes a means by which negotiators protect themselves against charges of unaggressive leadership.

The divorce mediator is faced with a different form of intra-party conflict: The emotional ambivalence of the parties about the divorce and

the partner whom they are divorcing. Anger, humiliation, grief, jealousy, and guilt are among the powerful emotions that may be competing with the spouses' desire to end the marriage. These conflicting emotional states may have adverse effects on the negotiation process.

> Mrs. K. initiated the divorce. Dr. K. claimed repeatedly during mediation that he loved his wife and children very much and did not want the divorce. On the other hand, he was often openly angry and bitter at having been "deserted" by his wife. Mrs. K. was consumed by guilt at ending the marriage. The effect of these cross-cutting emotions was apparent in the negotiations over division of marital assets, during which Mrs. K. said nothing in her own behalf, and simply acquiesced to her husband's offer to take 25% of their $83,000 in assets, although at the time she had no job and the custody of 3 young children.

2. Scarcity of divisible resources. The labor mediators indicated that arranging compromises is more difficult when the parties are negotiating under reduced material circumstances. The pressures generated by self-interest and the inability to arrange trade-offs by "sweetening the pie" were cited as two primary complications under such circumstances.

A similar problem faces the divorce mediator when parties confront the necessity of supporting two households on what previously supported--or barely supported--one. There is evidence from the tapes that negotiations were particularly likely to be prolonged and difficult where there had been

a previous history of debt and financial strain during the marriage.

3. Naive negotiators. It was the general consensus of the labor mediators that parties new to collective bargaining represent the single greatest obstacle to effective mediation. Said one:

> The sophisticated parties know that a mediator will be looking for alternatives. They will assist him in indicating what might be acceptable. They are more open to suggestion. The non-sophisticated party has a single-track mind. They win or they lose completely without salvaging what they can of the situation. This "all or nothing" approach doesn't lend itself to proper mediation.

In divorce mediation the negotiating naivete of the parties is virtually guaranteed by the newness of the process and the "first time around" characteristic of the divorce itself. In addition, in nearly all of the cases, the level of ignorance about basic details of family finances was high. Annual net income, outstanding indebtedness, monthly cash flow and a host of other important details were unknown or highly uncertain in the minds of one and frequently both spouses.

There were at least two major consequences of this ignorance for the mediator: In the first instance, the absence of sound information on the financial state of affairs made the search for viable compromises more difficult. Secondly, much time was spent by the mediator trying to educate the parties about certain fundamental principles of money management in the midst of negotiations, a time when ambivalence and emotional turmoil created strong obstacles to comprehension.

4. Discrepancy in relative power. The labor mediators expressed a general dislike for situations in which one party was clearly superior in terms of the ability to withstand the consequences of a strike, or had much greater informational or material resources at their command. Under such conditions the motivation to compromise is likely to be unequal. A good deal of mediator energy must be devoted to efforts at redressing, at least psychologically, the balance of power, with all the attendant risks of loss of impartiality.

In divorce mediation the imbalance of power issue was a prominent one, and generally stemmed from the disadvantaged position of the wife who often had given up college or career for the role of homemaker. Moreover, although husbands were frequently uninformed about financial matters, they were paragons of financial expertise in comparison to their wives. Husbands had almost exclusive control of important financial documents and were aware of financial arrangements of which their wives were ignorant. The ignorance of the wives combined with their heightened anxiety at their poor post-divorce prospects created strong pressures on the mediator to shore up the wives' side of negotiations.

> Mrs. W. had dropped-out of college to send her husband through dental school. She was to have custody of their three children and was clearly anxious about how she would manage after the divorce. She was highly suspicious of her husband's accounts of his financial assets during mediation, but also found it difficult to ask informed questions or to follow explanations

involving tax and business terminology. She relied increasingly on the mediator to explain matters to her ("What's depreciation?"). Dr. W. acquiesced verbally to repeated requests from the mediator to provide documentation of his assertions as to what he could and could not afford in child support and alimony, but continually failed to provide such information. An adverserial stance gradually developed between Dr. W. and the mediator.

Handling the Strategic Problems in Divorce Mediation

The principal difficulties facing the divorce mediator would appear to be the emctional ambivalence and reactivity of the parties, their ignorance on matters of bargaining substance and procedure, and the relatively disadvantaged position of the wives. A few necessarily brief and tentative words may be said on possible strategies for handling these issues.

1. A pre-mediation course in divorce negotiations. A pre-mediation course on fundamental matters of money management and tax law, the documentary requirements of mediation, and the art of constructive bargaining would seem to be of potential value. Such a course might also include information on the psychology of the divorcing process to alert the parties to the manner in which emotional conflicts can be displaced onto the bargaining relationship.

2. An "advocacy" model of mediation. In the context of an unequal power balance between the parties the model of a sole mediator imposes certain structural threats to mediator impartiality. These might be reduced if, in addition to the mediator, each spouse was provided with an advocate. This, of course, is the model which prevails in labor mediation. Unlike

mediation, however, divorce advocates would be members of the mediation staff and would work closely with each other and the mediator. The conflicting claims of the disputants would thereby receive full expression, but in a structural arrangement where competitive pressures could be more easily contained.

3. Handling emotional issues. The Mediation Center has elected to refrain from dealing with emotional issues during mediation and requests couples to refrain from angry attacks during negotiations. Couples are encouraged to recognize the stressful nature of divorce and seek private psychotherapy. At least in some cases, however, the emotional currents are so strong that some direct handling of them would seem to be required on the part of the mediator, who is in touch with the requirements of the bargaining situation in a way that an outside therapist is unlikely to be. Exactly how mediators might do this is not clear. One possibility is the use of individual sessions with each spouse or divorce therapy groups focusing on the emotional side of divorce.

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